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No. 99-830

In The

Supreme Court of the United States

DON STENBERG, Attorney General of the State of Nebraska, et al.,

Petitioners,

v.

LEROY CARHART, M.D.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA ATTORNEY GENERAL BILL LOCKYER IN SUPPORT OF RESPONDENT

BILL LOCKYER *
Attorney General

PETER J. SIGGINS (SBN 96233)
Chief Deputy Attorney General

PATRICIA A. WYNNE (SBN 105333)
Special Assistant Attorney General

1300 I St., Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5463

Counsel for Amicus Curiae

* *Counsel of Record*

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit's adoption of a broad unconstitutional reading of Nebraska's ban on partial-birth abortion, which directly conflicts with the narrower constitutional construction of similar statutes by the Seventh Circuit Court of Appeals and that of the state officials charged with enforcement of the statute, violates fundamental rules of statutory construction and basic principles of federalism in contradiction of the clear precedent of this Court?

2. Whether the Eighth Circuit misapplied this Court's instructions in Planned Parenthood v. Casey by finding that a law banning a rare and controversial method of killing a partially-born child, is an "undue burden" on the right to abortion?

LIST OF PARTIES

The Petitioners are Don Stenberg, Attorney General of the State of Nebraska; Gina Dunning, Director of Regulation and Licensure of the Nebraska Department of Health and Human Services; and Charles Andrews, M.D., Chief Medical Officer of the State of Nebraska. An additional Appellant/Defendant below was Mike Munch, Sarpy County Attorney.

The Respondent is LeRoy H. Carhart, M.D.

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INTEREST OF AMICUS

Personal privacy is of utmost importance to California and its citizens. In 1972, before this Court decided *Roe v. Wade*, 410 U.S. 113 (1973), the California electorate added explicit protection of the right of privacy to the California Constitution. Article I, section 1 of the Constitution of the State of California provides that "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

For nearly twenty years, California courts have held that enumerated right to privacy to protect the fundamental right of California women to choose their procreative destiny. *Committee to Defend Reproductive Rights v. Myers*, 29 Cal.3d 252 (1981). A freedom of choice that under California law predates the explicit inclusion of the right to privacy in Article I, section 1, and this Court's decision in *Roe. People v. Belous*, 71 Cal.2d 954 (1969).

Now, California submits this amicus brief to defend the fundamental privacy right of women to make profoundly personal and moral procreative decisions; decisions fraught with medical complexity; decisions that do not lend themselves to clear statutory distinctions or bright line rules. "The morality of abortion is not a legal or constitutional issue; it is a matter of philosophy, of ethics, and of theology. It is a subject upon which reasonable people can, and do, adhere to vastly divergent convictions and principles." *Committee to Defend Reproductive Rights v. Myers*, 29 Cal.3d 252, 284 (1981).

The issue before this Court does not present a moral choice, it presents a constitutional choice. The impact of the Nebraska statute on the constitutional right to privacy, a right cherished by Californians, is what this Court must decide.

SUMMARY OF ARGUMENT

The Nebraska abortion procedure ban, Neb. Rev. Stat. § 28-326(9), criminalizes a wide range of safe abortion procedures including the safest and most common second-trimester methods. The law violates women's privacy interests and seriously jeopardizes their health and liberty. The statute places a higher value on proscribing a safe medical procedure, than protecting the health of women. In Nebraska, women must either find a physician who will perform a first or second trimester abortion using a less common and less safe method, or they must travel to another jurisdiction to terminate an unwanted or unsafe pregnancy. For some, the Nebraska statute will preclude access to an abortion altogether.

A criminal statute banning any medically safe method of abortion unduly infringes on women's constitutional rights of life, liberty and privacy. There will always be women for whom the banned procedure is medically the safest and most appropriate. Moreover, if a state can ban one medically safe abortion method, it can attempt to ban others. As specific procedures are gradually eliminated, abortion will become increasingly

unavailable and freedom of choice more illusory. Criminalizing safe abortion procedures has the effect of subordinating considerations of women's health to a legislative policy declaration that neither protects fetal life nor public health. For these reasons, the Nebraska abortion statute is unconstitutional, and the judgment of the United States Court of Appeals for the Eighth Circuit should be affirmed.

ARGUMENT

I.

LAWS THAT BAN MEDICALLY SAFE AND APPROPRIATE ABORTION PROCEDURES BUT DO NOT SAFEGUARD HEALTH, MAINTAIN MEDICAL STANDARDS OR PROTECT FETAL LIFE VIOLATE WOMEN'S CONSTITUTIONALLY PROTECTED RIGHT TO PRIVACY

Since this Court decided *Roe v. Wade*, 410 U.S. 113 (1973), the Constitution has protected a woman's right to decide whether or not to terminate her pregnancy before fetal viability. *Roe v. Wade*, 410 U.S. at 153. In the years since *Roe* was decided, the Court has repeatedly reaffirmed this central tenet, even when approving restrictions on abortion. "The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce." *Planned Parenthood v. Casey*, 505 U.S. 833, 871 (1992).

The loss of the right to terminate an unwanted pregnancy inflicts grievous damage on women. Indeed, the *Casey* joint opinion recognized that, with pregnancy, "the

liberty of the woman is at stake in a sense unique to the human condition and so unique to the law." *Casey*, 505 U.S. at 852. Requiring women to sacrifice their liberty in order to enable others to survive imposes a duty on women that has no parallel for men:

> The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist that she make the sacrifice.

Casey, 505 U.S. at 852.

Nebraska seeks to criminalize what it refers to as "partial birth abortion," defined as "deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that . . . will kill the unborn child." Neb. Rev. Stat. § 28-326(9); *see Carhart v. Stenberg*, 192 F.3d 1142, 1146 (8th Cir. 1999). The statute prohibits such described abortions at any stage of pregnancy, both before and after viability. As the Circuit court held, the Nebraska statute criminalizes the performance of the dilation and evacuation ("D&E") procedure, as well as a variant of it, the dilation and extraction ("D&X") procedure – the safest and most common methods of abortion in the second trimester.[1] *Carhart*, at 1145. The

[1] Neither the district court nor the Court of Appeals reached the question of whether the statute bans some first-trimester procedures as well as most second-trimester procedures, *see Carhart v. Stenberg*, 192 F.3d 1142, 1145 (8th Cir. 1999) (finding ban unconstitutional because it prohibits the most common second-trimester procedure); *Carhart v. Stenberg*, 11 F. Supp. 2d 1099, 1121, 1127 (D. Neb. 1998) (discussing impact of ban on abortions between 16th and 20th week).

Nebraska law thus presents women with a dilemma: they must either find a provider who offers a less common and less safe procedure, or they must find the means to travel to obtain services in a jurisdiction that does not have such restrictions.

This dilemma will severely harm many women. First, it will expose women to unnecessary health risks by eliminating the safest second-trimester procedures. Over the past twenty-five years, D&E abortions have all but replaced previously common induction procedures. The Centers for Disease Prevention and Control attribute the greater reliance on D&E procedures to their lower risk of complications. *See* L. Koonin, et al., Centers for Disease Prevention and Control, *Abortion Surveillance – United States, 1996* at 8 (July 30, 1999).

Eight years ago, this Court observed that medically safe abortion is critically important to women's lives. *See Planned Parenthood v. Casey*, 505 U.S. at 856. This Court has consistently invalidated statutes requiring pregnant women to place their own health at risk for the sake of the fetus, even when the fetus is viable. *See Casey*, 505 U.S. at 846; *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 768-69 (1986), *overruled in part on other grounds by Casey*, 505 U.S. at 881-84; *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 79 (1975); *Roe*, 410 U.S. at 164-65.

In *Roe v. Wade*, the Court recognized that a "state may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision." *Roe v. Wade*, 410 U.S. at 163.

Here, Nebraska is not seeking to safeguard health, or maintain medical standards. The Nebraska statute does not place a value or importance on women's health, and prohibits the most medically accepted methods of terminating first and second trimester pregnancies. Neither does the statute protect potential life. In dissent, Chief Judge Posner of the Seventh Circuit said about comparable statutes in Wisconsin and Illinois:

> These statutes, remember, are not concerned with saving fetuses, with protecting fetuses from a particularly cruel death, with protecting the health of women, [or] with protecting viable fetuses. . . . They are concerned with making a statement in an ongoing war for public opinion, though an incidental effect may be to discourage some late-term abortions. The statement is that fetal life is more valuable than women's health.

Hope Clinic v. Ryan, 195 F.3d 857, at 880-81 (7th Cir. 1999). The Nebraska legislature's ban on medically preferred abortion methods is so plainly unrelated to the achievement of the goal of protecting fetal life that its true purpose appears unstated.

In this case, both because of the immaturity of the fetus before the twentieth week of pregnancy and because, at least in theory if not in fact, a woman may

still terminate her pregnancy by other less medically accepted methods, fetal survival is not an issue. If states may not sacrifice women's health to protect viable fetal life, such a trade-off is even more impermissible where there is no question of fetal survival. Yet the Nebraska statute requires that women make such a sacrifice.

Most importantly, however, if the state can criminalize one safe abortion method, it could raise questions about whether other methods could also be banned. Indeed, one of the only remaining second-trimester abortion methods, intrauterine saline instillation, has been the target of a statutory ban in the past. *See Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. at 75-76. Such a course would quickly eviscerate *Roe* and *Casey*, as those cases surely do not stand for the proposition that as long as there is one legal abortion procedure that is safe for most women, all others may be banned.

Neither Nebraska nor its *amici* can escape application of *Roe* and *Casey* through a semantic re-casting that evokes images of full-term pregnancy and viability. In no sense is a viable life "born" in any respect, either through a D&E or a D&X procedure. The Nebraska statute itself makes this clear: "Partial-birth abortion means an abortion procedure in which the person performing the abortion partially delivers vaginally a living *unborn* child. . . . " Neb. Rev. Stat. § 28-326(9) (emphasis added).

Properly framed, the legal question is whether a statute banning medically preferred methods by which a woman may exercise her constitutional right to terminate a pre-viability pregnancy is a valid limitation of that right where the statute does not safeguard health, maintain

medical standards or protect potential life. This issue falls squarely within the interpretive framework of *Casey* and *Roe* and does not present a novel question of fetal rights. As Justice Stevens noted, "The Court in *Roe* carefully considered, and rejected, the State's argument 'that the fetus is a "person" within the language and meaning of the Fourteenth Amendment.' . . . From this holding, there was no dissent; indeed, no Member of the Court has ever questioned this fundamental proposition." *Casey*, 505 U.S. at 913 (quoting *Roe v. Wade*, 410 U.S. 113, 156 (1973)).

CONCLUSION

For all the foregoing reasons *amicus curiae* State of California respectfully request that this Court uphold the judgment of the Court of Appeals for the Eighth Circuit.

Dated: March 28, 2000

Respectfully submitted,

BILL LOCKYER
Attorney General

PETER J. SIGGINS
Chief Deputy Attorney General

PATRICIA A. WYNNE
Special Assistant Attorney General
Counsel for Amicus Curiae